Supreme Court, U.S.
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No. -_____

In The
Supreme Court Of The United States

JESSE HERNANDEZ

Petitioner,

v.

C. A. TERHUNE, DIRECTOR
DEPARTMENT OF CORRECTIONS
STATE OF CALIFORNIA

Respondent .

Petition For A Writ Of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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15 pp

TABLE OF CONTENTS

EXHIBIT	Page Nos.
1. Report and Recommendation for Order Dismissing Petition for Writ of Habeas Corpus	SA1- 8
2. Order Adopting Report and Recommendation Denying Petition for Writ of Habeas Corpus and Overruling Petitioner's Objections	SA9-12

SA-1

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JESSE DALE HERNANDEZ,	)	**Case No. 99CV0782-L (JAH)**
Petitioner,	)	
v.	)	**Report and Recommendation**
A. TERHUNE, Director,	)	**For Order Dismissing**
Respondent.	)	**Petition for Writ of Habeas**
	)	**Corpus**

BACKGROUND

Petitioner, JESSE HERNANDEZ, is a state prisoner who, by and through his attorney of record Nicholas De Pento, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging the legality of his conviction by the trial court and alleging ineffective assistance of counsel at trial.

This Court has throughly reviewed Hernandez's amended petition, respondent's motion to dismiss, Hernandez's reply memorandum, and all supporting documents submitted by both parties. After considering all the documents submitted, this Court recommends denial of the petition without prejudice based on petitioner's failure

to satisfy the exhaustion requirement of 28 U.S.C. § 2254(b) as to his two claims presented in the petition.

PROCEDURAL HISTORY

On July 8, 1996, a six-count information was filed charging petitioner with attempted murder (Count 1), possession of a destructive device (Count 2), attempted arson (Count 3), misdemeanor vandalism (Counts 4 and 5), and stalking (Count 6). (Lodgement 1 at 9).

On July 9, 1996, petitioner's jury trial commenced. (Id. at 144). On July 17, the jury found petitioner guilty of all six counts. (Id. at 157). Consequently, on September 9, 1996, petitioner was sentenced to life in prison with the possibility of parole. (Id. at 168). Shortly, thereafter, petitioner appealed. (Id. at 138).

On April 14, 1998, in an unpublished opinion, the California Court of Appeal affirmed petitioner's conviction. (Lodgement 2). Petitioner then filed a petition for writ of habeas corpus to the California Supreme Court on June 8, 1998. (Lodgement 3). In that petition, petitioner claimed ineffective assistance of counsel due to his trial counsel's failure to challenge the sufficiency of evidence admitted and failure to move for severance of trials. Id. The California Supreme Court denied this first petition on the grounds that the petition was untimely filed, thus, never reaching the merits of petitioner's claims.

On April 16, 1999, petitioner filed a habeas corpus action to the U.S. District Court for the Southern District of California. Subsequently, on May 4, the Honorable Barry T. Moskowitz, United States District Court Judge, dismissed the action without prejudice for petitioner's failure to allege exhaustion of state judicial remedies.[1]

On July 1, 1999, petitioner filed a second petition for writ of habeas corpus before the California Supreme Court. In that petition, petitioner alleged ineffective assistance of counsel due to his appellate counsel's failure to timely file his initial habeas corpus petition before the state Supreme Court. (lodgment 4). The California Supreme Court denied this second petition on September 29, 1999.

Petitioner then filed the instant petition in federal court on July 7, 1999. Here, petitioner alleges ineffective assistance of his trial counsel, not his appellate counsel. Now, the Court issues this report and recommendation with respect to this amended petition.

DISCUSSION

I. Exhaustion Requirement

Applicants for writs of habeas corpus must exhaust state court remedies prior to proceeding in federal court, and petitions that contain even one unexhausted claim must be

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[1] See Order Dismissing Action for Failure to Allege Exhaustion. (May 4, 1999).

dismissed. Duncan v. Henry, 513 U.S. 364 (1995); Rose v. Lundy, 455 U.S. 509 (1982). The exhaustion of available state remedies is a prerequisite to a federal court's consideration of claims presented in habeas corpus proceedings. 28 U.S.C. § 2254(b); see Rose, 455 U.S. at 522; McQueary v. Blodgett, 924 F.2d 829, 833 (9th Cir. 1991).

As a matter of federal-state comity, federal courts will not consider a claim in a habeas corpus proceeding until the state courts have had an opportunity to act upon the claim. Rose, 455 U.S. at 515. The exhaustion requirement assures the state courts of the "initial 'opportunity to pass upon' and correct alleged violations of its prisoners' federal rights." Picard v. Connor, 404 U.S. 270, 275 (1971) (quoting Wilwording v. Swenson, 404 U.S. 249, 250 (1971). The exhaustion requirement also "prevent[s] [the] disruption of state judicial proceedings," Rose, 455 U.S. at 518, and serves "the federal interest in economizing scarce federal judicial resources." Jennison v. Goldsmith, 940 F.2d 1308, 1311 (9th Cir. 1991).

Dismissal of a petition is dictated by the doctrine of comity. Rose, 455 U.S. at 518. Under the doctrine of comity, "'one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and cognizance of the litigation, have had an opportunity to pass on the matter.'" Id. at 518 (quoting Darr v. Burford, 338 U.S. 200, 204 (1950)). As such, the exhaustion of state remedies is required to uphold "the state courts' role in the

enforcement of federal law and [to] prevent [the] disruption of state judicial proceedings." Rose, 455 U.S. at 518.

To exhaust a habeas claim properly, a petitioner must present all contentions in support of his petition to the state supreme court, including all legal authorities and arguments. Gatlin v. Madding, 189 F.3d 882, 888 (9th Cir. 1999). In addition, the substance of petitioner's contentions must be "fairly presented" to the state courts, including its highest court, and the courts must dispose of the claims on the merits. Castille v. Peoples, 489 U.S. 346, 351 (1989); Anderson v. Harless, 459 U.S. 4, 6 (1982); Picard, 404 U.S. at 275-78. A petitioner's claims are "fairly represented" when he has provided the state courts with a "fair opportunity" to apply controlling legal principles to the facts bearing on the constitutional claim. Anderson, 459 U.S. at 6 (citing Picard, 404 U.S. at 276-77).

II. Petitioner's Claims for Relief

In the instant petition, petitioner alleges that he was denied effective assistance of counsel at trial based on his attorney's failure to exclude prejudicial "other act" evidence and failure to sever improperly joined actions.

Respondent, in his motion to dismiss, argues that petitioner's claims of ineffective assistance of counsel at trial are unexhausted. Respondent asserts two grounds for dismissal of the petition: (1) that petitioner's state petition

is still pending; and (2) that petitioner's current federal claims are not fairly presented in his state petition. The first ground for dismissal is moot because petitioner's state petition is no longer pending with the California Supreme Court.[2] As to respondent's second ground for dismissal, this Court agrees with respondent that petitioner did not fairly represent his current claims of ineffective assistance of trial counsel before the California Supreme Court.

In his July 1, 1999, petition for writ before the California Supreme Court, petitioner claimed ineffectiveness of his appellate counsel for failing to timely file petitioner's first petition for review by the state Supreme Court. In contrast, petitioner now claims ineffective assistance of counsel regarding his trial counsel - a claim never reviewed by the California Supreme Court on its merits because of petitioner's failure to timely file the petition so alleging that claim. Although petitioner's claims regarding ineffective assistance of his trial and appellate counsel may be related, the claims are not the same. By presenting a different claim to this Court - ineffective assistance of trail counsel - than that submitted to the California Supreme Court - ineffective assistance of appellate counsel - petitioner has failed to provide the state court with a "fair opportunity" to adjudicate the petitioner's instant claims of incompetent performance as to his trial counsel.

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[2]Exhibit A in petitioner's reply papers shows the California Supreme Court Order denying state petition for writ of habeas corpus. (September 29, 1999).

Thus, this Court finds that the California Supreme Court has not had the opportunity to decide the merits of petitioner's instant claims of ineffective assistance of counsel at trial. According to the United States Supreme Court, for purposes of federal habeas relief, a petitioner's claims are "fairly represented," and thus fully exhausted, when the substance of petitioner's contentions are presented to the state courts and disposed of on the merits. Castille, 489 U.S. at 351. Absent a showing of sufficient cause or presentation of a procedural bar, this Court is disinclined to make an exception to the exhaustion requirement. Therefore, petitioner's instant claim remain unexhausted because the state courts have not yet considered the merits of the claims presently before this Court.

Accordingly, this Court recommends that the District Court DISMISS WITHOUT PREJUDICE petitioner's petition for writ of habeas corpus for failure to satisfy the exhaustion requirement.

CONCLUSION AND RECOMMENDATION

For the foregoing reasons, this Court recommends that the District Court **DISMISS WITHOUT PREJUDICE** petitioner's petition for writ of habeas corpus for failure to exhaust. This report and recommendation of the undersigned Magistrate Judge is submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). IT IS ORDERED that no later than **December 30, 1999**, any party to this

action may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and served on all parties no later than **January 14, 2000**. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: December 1, 1999

/S/
JOHN A. HOUSTON
United States Magistrate Judge

cc: Judge Lorenz
All Counsel of Record

SA-9

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JESSE DALE HERNANDEZ,	)	**Case No. 99CV0782-L (JAH)**
Petitioner,	)	
	)	**Order Adopting Report and**
v.	)	**Recommendation, Denying**
A. TERHUNE, Director,	)	**Petition for Writ of Habeas**
Respondent.	)	**Corpus and Overruling**
	)	**Petitioner's Objections**

Petitioner Jesse Hernandez filed an amended petition for writ of habeas corpus pursuant to 28 U.S.C. 2254. In his petition, petitioner contends his trial attorney provided ineffective assistance in violation of the Constitution. Respondents were ordered to brief whether petitioner had exhausted his claim of ineffective assistance of trial counsel. On December 3, 1999, pursuant to 28 U.S.C. § 636(b)(1), the magistrate judge filed a Report and Recommendation ("R&R") recommending denial of petitioner's habeas petition. Petitioner filed his Objections to the R&R on December 30, 1999; respondent did not file a reply to the Objections.

Having fully considered the matters presented, the Court adopts the R&R and denies petitioner's petition for writ of habeas corpus.

DISCUSSION

Before a federal court may consider granting habeas relief, a federal habeas petitioner must exhaust all available state court remedies on direct appeal and by collateral proceedings. Keeney v. Tamayo-Reyes, 504 U.S. 1, 9-10 (1992). The habeas petitioner must "fairly present" to the state courts the "substance" of his federal habeas corpus claim. Anderson v. Harless, 459 U.S. 4, 6 (1982). Fairly presenting a claim requires that the petitioner raise in the state court proceeding both the operative facts and the legal theory upon which the claim is based. Id.

As discussed in the R&R, petitioner's conviction was affirmed by the California Court of Appeals on April 14, 1998. Thereafter, petitioner filed a petition for review in the California Supreme Court in which petitioner argued ineffective assistance of trial counsel based upon an alleged failure to challenge the sufficiency of evidence admitted and failure to move for severance of counts. The California Supreme Court denied the petition as untimely pursuant to California Rules of Court 24(a) and 28(b).

Petitioner then filed his first federal petition for writ of habeas corpus which the district court dismissed without prejudice for failure to exhaust state remedies. Petitioner then filed in the California Supreme Court a petition for writ of habeas corpus alleging ineffective assistance of appellate counsel for counsel's failure to file petitioner's initial state petition for review in a timely manner. The

California Supreme Court denied this second petition in September 1999.

Petitioner brings the present federal habeas petition alleging ineffective assistance of trial counsel based upon trial counsel's failure to exclude "other act" evidence and failure to sever counts. Petitioner contends because he has exhausted his state petition for writ of habeas corpus concerning ineffective assistance of appellate counsel, he has exhausted both claims of ineffective assistance of trial counsel and ineffective assistance of appellate counsel. Based on this procedural history, petitioner argues the ineffective assistance of appellate counsel claim demonstrates the cause showing necessary to excuse a procedural default.

A habeas petitioner's procedural default of his claims in state court will not foreclose federal review of those claims if the petitioner can show "cause" for his default, i.e., "some objective factor external to the defense" prevented the petitioner from complying with the state procedure under which he is alleged to have defaulted his claim. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986). Ineffective assistance of counsel may show cause for a procedural default if it amounts to an independent constitutional violation. Id. This is the position petitioner take here: petitioner's appellate counsel failed to file a post-conviction brief, i.e., a Petition for Review, within the time provided under California Rules of Court 24(a) and 28(b). See Petitioner's Objections to Report and Recommendation at 1.

But as a recent Ninth Circuit notes, there is no constitutional right to an attorney in state post-conviction proceedings and "[t]herefore, any ineffectiveness of [petitioner's] attorney in the post-conviction process is not considered cause for the purposes of excusing the procedural default at that stage." *Manning v. Foster*, 2000 WL 1180554, 3 (9th Cir. August 22, 2000) (*citing Coleman, 501 U.S. at 752* and Ortiz v. Stewart, 149 F.3d 923, 933 (9th Cir. 1998). Thus, ineffective representation in post-conviction proceedings does not constitute cause for procedural default.

As noted in the R&R, petitioner's current claims before this court of ineffective assistance of trial counsel were never considered by the California Supreme Court because petitioner failed to timely file the petition for review with this claim asserted. Thus, the ineffective assistance of trial counsel claims have not been exhausted. Moreover, the presentation of petitioner's ineffective assistance of appellate counsel claim to the California Supreme Court does not provide cause for the exhaustion requirement with respect to petitioner's ineffective assistance of trial counsel claim. Accordingly, the Court adopts the magistrate judge's Report and Recommendation, finds petitioner's

claims are unexhausted, and dismisses without prejudice petitioner's petition for writ of habeas corpus.

IT IS SO ORDERED.

Dated: 8/30/2001 /s/

M. JAMES LORENZ
UNITED STATES DISTRICT JUDGE